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TRADE AND ECONOMIC POLICY COMMENTARY No. 23



EVOLVING CHALLENGES FOR THE WTO IN GOVERNMENT PROCUREMENT

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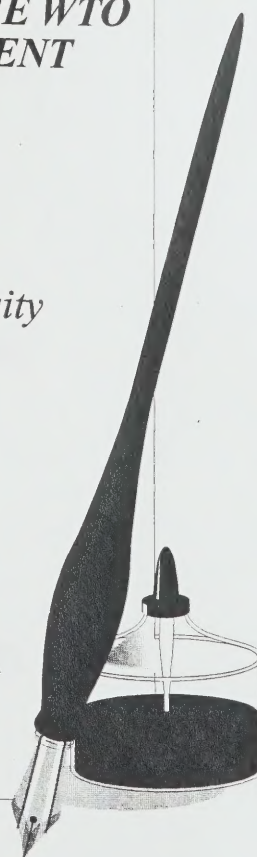
*Jane Barrett
Co-op Student, Concordia University*

and

*Robert T. Stranks
Senior Research Coordinator*

*Trade and Economic Analysis
(EET)*

(August 1998)



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Government Procurement-Looking Ahead

This Commentary explores several issues that are likely to arise in future negotiations concerning government procurement within the context of the World Trade Organization (WTO). As a relatively open economy with a small domestic market, Canada has an ongoing interest in promoting both nondiscriminatory procurement practices between countries, and openness to foreign competition in governments' procurement practices. Government procurement is estimated to represent 10-15% of world GDP; thus the liberalization of this market worldwide represents significant opportunities for Canadian suppliers.¹

The Commentary first sets out some of the important trade issues related to government procurement. It then explains the plurilateral rules pertaining to government procurement in the WTO, and concludes with some views on the evolving challenges of the international government procurement agenda.

Government Procurement and Trade

Government procurement is the purchase of goods and services by governments.² It becomes a trade issue in the context of the market access that foreign suppliers have to a given country's government procurement, as governments' purchasing decisions can significantly influence trade opportunities as well as investment decisions.

There are a number of reasons why governments have traditionally used procurement as a policy instrument to favour domestic producers. Public sector procurement can be used as a political tool - essentially to win public favour - to support activity in certain tidings, to create jobs in certain areas, to reduce imports, or to stimulate technology in specific sectors. Government procurement can also be used as a tool for social and economic change, in terms of subsidizing small businesses, helping firms which are or are not unionized and retaining domestic earnings. Favouring domestic producers, it is further argued, will ensure reliable domestic suppliers of essential government services, especially with respect to national defense procurement.³ These types of essentially protectionist policies similar to non-tariff barriers, have proven costly due to loss of competitiveness, unnecessarily high cost of services to the public, waste of resources and efficiency, and a decline in

1 W.C. Graham, "Government Procurement Policies: GATT, the EEC and the United States" in Federalism and the Canadian Economic Union, ed. M.J. Trebilcock, J.R.S. Prichard, T.J. Courchene and J. Whally, (eds.), (Toronto: University of Toronto Press, 1983)

2 In response to the Questionnaire on Government Procurement of services, distributed by the Working Party on GATS rules, Canada defined government procurement in relation to Canada's objectives as "The direct acquisition on the part of Canadian federal government departments and agencies of material and services for the fulfillment of their mandates."

[http://www.wto.org {S/VPGR/VV/1 1/Add. 7} Communication from Canada: Response to Questionnaire on Government Procurement of Services.](http://www.wto.org/S/VPGR/VV/1/1/Add.7/Communication%20from%20Canada%20Response%20to%20Questionnaire%20on%20Government%20Procurement%20of%20Services.pdf)

3 Robert E. Baldwin, Non-tariff Distortions of International Trade. (Washington: Brookings Institution, 1970)

incentive to innovate. Thus while some employment may be artificially retained in certain sectors, the economy as a whole is penalized by such measures.⁴

International agreements on government procurement have been negotiated in recent years to reduce the practice of favouring domestic producers over foreign suppliers. Since government procurement practices touch upon a number of domestic sensitivities (including the aforementioned examples such as politically sensitive industries and regions) and non-trade policy objectives, reaching agreement on an appropriate balance of international regulation of market openness, and retaining governments' ability to purchase from suppliers on a favourable basis has proven to be, and continues to be, a difficult undertaking.

As the government procurement market is so large (10-15% of global GDP), Canada has a strong incentive to pursue liberalization as it provides not only opportunities for large Canadian companies but small and medium-sized enterprises benefit as well as they frequently supply the large Canadian companies. Furthermore, the Canadian public benefits as there is increased competition for government purchases.⁵

In the Beginning: Government Procurement in the GATT 1947

Because of governments' desire to use government procurement in a flexible manner to pursue political domestic objectives unconstrained by international rules, this major area of government activity was specifically excluded (in Article III) from the rights and obligations of the Government Agreement on Trade and Tariffs (GATT), negotiated in 1947. This situation continued until the Tokyo Round of Trade Negotiations (1973-1979) when Contracting Parties to the GATT became concerned that this exclusion represented a considerable gap in the trading system. Consequently, government procurement was negotiated during that Round, and a limited plurilateral agreement was achieved in 1979, with the agreement entering into force in 1981. This first GATT government procurement agreement, known as The Code on Government Procurement, applied only to Parties who were signatories to the Code; all the other GATT members retained the right to discriminate, as before, with respect to public procurement.⁶ In Canada's case, the Code applied only to goods purchased by covered federal departments and agencies.⁷

4 Richard E. Caves, Jeffrey A. Frankel and Ronald W. Jones. World Trade and Payments: An Introduction, 5th ed., (Illinois: Scott, Foresman/Little, Brown Higher Education, 1990)

5 See Organization for Economic Cooperation and Development, Open Markets Matter: The Benefits of Trade and Investment Liberalization (Paris: DECO, 1998) for a detailed analysis of the benefits to business of open markets.

6 The Code established at the Tokyo Round of trade negotiations only covered federal government procurement of goods and had twelve signatories; Austria, Canada, The European Community-Belgium, Denmark, France, The Federal Republic of Germany, Ireland-Finland, Hong-Kong, Israel, Japan, Norway, Singapore, Sweden, Switzerland, and the United States.

7 Covered federal departments and agencies" is a reference to a list of such entities that each signatory chose to be bound under the Code on Government Procurement rules.

Government Procurement during the Uruguay Round

During the Uruguay Round negotiations (1986-1994) when the World Trade Organization was established, a revised public procurement agreement was negotiated.⁸ This agreement, the Agreement on Government Procurement (GPA), entered into force on January 1, 1996.⁹ The GPA is one of four plurilateral agreements incorporated in the WTO (the other three are the Civil Aircraft Agreement, the Meat Agreement, and the Dairy Agreement); thus the GPA applies only to the countries that have signed it, and then only for the entities that are listed in the Annexes of each country. Parties to the Agreement are: Canada; Austria; Belgium; Denmark; Finland; France; Germany; Greece; Hong-Kong, China; Ireland; Israel; Italy; Japan; Korea; Liechtenstein; Luxembourg; The Netherlands; Aruba (Netherlands); Norway; Portugal; Singapore; Spain; Sweden; Switzerland; United States and United Kingdom. There are also twelve observer countries and two observer intergovernmental organizations; the IMP and the OECD.¹⁰

The Government Procurement Agreement within the WTO

The GPA is founded on three main principles that are set out in its objectives which are;

Recognizing the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade;

Recognizing that laws, regulations, procedures, and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers;

Recognizing that it is desirable to provide transparency of laws, regulations, procedures, and practices regarding government procurement;¹¹

The first two principles are the basic GATT principles of national treatment and non-

8 The WTO, established in 1995, is an international organization that is responsible for administering a number of multilateral treaties. These treaties were negotiated during the GATT Uruguay Round of Trade Negotiations (1986-1994). These treaties include a revised GATT, the General Agreement on Trade and Services (GATS), the Agreement on Trade-Related Intellectual Property Rights (TRIPS), and the Agreement on Trade-Related Investment Measures (TRIMS).

9 The Agreement on Government Procurement is referred to by the WTO as the GPA. It is also referred to by other governments as the AGP.

10 The twelve observer states are: Argentina, Australia, Bulgaria, Chile, Chinese Taipei, Colombia, Iceland, Latvia, Panama, Poland, and Turkey. Representatives of organizations or countries accorded observer status may be invited to speak at meetings. The right to speak does not include the right to circulate papers or to make proposals unless an organization is specifically invited to do so, nor to participate in the decision-making.

11 World Trade Organization, Agreement on Government Procurement (Marrakesh: WTO, 1994), 17.

discrimination. This means that the GPA prohibits the use of preferences in procurement involving domestic against foreign suppliers or of preferences between foreign suppliers. The third principle is the GATT principle of transparency: the GPA contains explicit rules to ensure transparency at every stage of the procurement process.

Another long-term objective of the GPA and of the parties to it, was to expand the membership of the agreement. The GPA reads: "Desiring to encourage acceptance of and accession to this Agreement by governments not party to it."¹²

This objective has not been successful for a number of reasons, primarily that the concept of free-trade, has devolved into, in essence, a "fair trade" reciprocal agreement. This matter will be discussed in the next section.

The key objective of reducing preferential government procurement in order to contribute to the liberalization and expansion of world trade takes into account a number of considerations.¹³ First, discriminatory procurement practices have the potential to adversely affect trade. Second, the reduction or the prohibition of preferences in procurement practices allow foreign producers and competitively priced products access to the domestic market.¹⁴ Third, transparent, nondiscriminatory, competitive public procurement systems encourage innovation and long-run competitiveness. Fourth, non-discriminatory procurement reduces the cost of service to the public.

To achieve these key objectives of non-discrimination, national treatment and transparency, the embodiment of these three principles in tendering procedures and qualification of suppliers is extremely important (Annex 1 outlines the GPA tendering procedures). The tendering procedures of the GPA are designed to maximize transparency and non-discriminatory practices. For example, the GPA's ex-ante transparency requirements stipulate that adequate effort be made to inform all interested bidders about relevant aspects of the procurement in question. Expost transparency requirements stipulate that adequate information be provided regarding the decisions that are taken. On request, justifications for decisions must also be made by the procuring entity. With respect to preventing discrimination, the tendering procedure rules include: use of technical specifications in invitations to bid, conditions of qualification of suppliers eligible to bid, and time limits on tender and delivery.

¹² Ibid., 17.

¹³ The GPA puts into a legal context the economic considerations outlined in the earlier section "Government Procurement and Trader".

¹⁴ For all intents and purposes, with these rules, government purchases will be on the same basis as private sector purchasing .

The importance of transparency to the procurement process led to the formation by the WTO of a Working Group on Transparency in Government Procurement. The Group's mandate is to enhance transparency of the procurement process (Annex 2 provides details of the Group's work).¹⁵ In conducting its research, this Group has studied a number of procurement practices and guidelines, including those addressed by the Asia Pacific Economic Cooperation (APEC) Government Procurement Experts Group (See Annex 4) and those of the World Bank and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Government Procurement.

In addition to its non-discrimination, national treatment, and transparency requirements, the GPA also expanded the scope of the Tokyo Round Code on Government Procurement. It extended its coverage to include some services and broadened the coverage of central government and sub-central entities.¹⁶ The procurement disciplines were further defined and elaborated to include, for instance, tendering procedures and a bid challenge mechanism. With these changes, the procurement markets available to signatories, subject to GPA discipline, is estimated at US \$400 billion annually.¹⁷

The value of US commitments is estimated at over US \$100 billion annually. In 1993 the US claimed 80.35% of Canada's total government procurement exports. Such reliance on the US should provide incentive for Canada to seek increased membership to broaden our export base in the government procurement market. Of the "Quad" countries (Canada, EU, US, and Japan), Canada represents only 2% of the procurement market. Thus for Canada, there are tremendous benefits to increased liberalization of this market.¹⁸

Looking Forward: Outstanding and Future Issues

Given the political and social sensitivities concerning government procurement, the mere existence of the WTO Government Procurement Agreement is an accomplishment. The GPA is innovative in its regulations for transparency and in that its procedure to challenge procurement decisions can come before national courts or independent bodies. Thus no special regulating agency is required, nor is harmonization of procurement practices.

15 The decision to establish the Working Group was made at the 1996 WTO Ministerial held in Singapore.

16 The agreement incorporates federal and sub-central governments, agencies, and entities (in Canada these are Crown corporations) and covers goods, some services (such as construction) over the thresholds and subject to the limitations and exceptions specified by each country.

17 Jeffrey J. Schott and Johanna W. Buurman The Uruguay Round: An Assessment. (Washington: Institute for International Economics, 1994)

19 Victor Lonmo. "WTO Agreement on Government Procurement; Impact on 'Quad' Countries" (Ottawa: DFAIT, 1995), 28.

It should be recognized, however, that government procurement is only part of the effective market access equation, and that the degree of openness of government procurement is affected by a range of other policies. For example, the GPA does not address trade-distorting measures such as tariffs or rules of origin. Thus, when considering market openness, it must be realized that restricted government procurement on products with low tariffs or low rules of origin requirements, and open government procurement on products with high tariffs or high rules of origin requirements, essentially have the same end result, one of restricted market access. Future trade negotiations need to focus on the fact that liberalization in procurement policies requires the liberalization of component parts such as tariff reductions and a decrease in rules or origin in order to be effective.

In addition to the trade liberalization shortcomings, the GPA has three technical areas of weakness. These are the bid-challenge mechanism, the setting of thresholds, and transparency in the electronic posting of contracts.

The bid-challenge problems include low levels of compensation to a successful challenger, the absence of restrictions on settlements, and the lack of provision for the challenge and review of bail-outs.¹⁹ As it stands now, successful challengers can only be compensated for the cost of the bid preparation and submission.²⁰ Successful challengers of a contract award may also receive "settlements" (either from corrupt governments or firms in a duopoly) which could lead to either collusive outcomes between firms or to "buying-off" by procuring entities. There also appears to be a need for rules for defining bail-out policies. Governments are inclined to bail-out domestic firms which claim bankruptcy, and to sue foreign firms if they declare bankruptcy. This encourages domestic firms to quote a lower price for the contract, with the knowledge that government assistance would be forthcoming if there were any financial difficulty.

Another weakness of the GPA is the adherence to thresholds. Some members of the GPA consider the nature of their economies such that they have made their construction procurement threshold values higher than those of other members. This has resulted in retaliation by other members such as restricting the bid-challenge right for those countries.²¹

19 Aaditya Mattoo. *The Government Procurement Agreement.. The World Economy*, 19, no.6 {1996}.

20 World Trade Organization. *Government Procurement Agreement*, (Marrakesh; World Trade Organization, 1994), 37.

21 The Agreement applies to those procurements which are of a value above a threshold, which each signatory indicates. For instance, all signatories maintain a threshold of US \$182,000 for goods and services, (other than construction services) for purchases by central government entities. For construction services that figure is US \$7million for most signatories (US \$6.3 million for Japan, US \$11.9 million for Israel and US \$21 million for non-central government contracts for Korea and Japan).

The higher thresholds from Israel, Korea and Japan have prompted a reply from the European Union under the Agreement, denying the right to suppliers of these three countries to challenge awards of construction contracts by EU entities, where their value is less than the higher threshold applied by them. Japan furthermore maintains a separate and distinct threshold for architectural, engineering and other technical services covered by the Agreement of US \$630,000 for purchasing entities at the central government level, as well as for the "utilities" and public authorities, and US \$2.1 million.

There remains also considerable controversy over the transparency of the electronic posting of contract abstracts for potential bidders. There thus appears to be a need for some standardization or harmonization of posting of contracts. The most transparent and cost-effective mechanism would be a free-access website where contract abstracts are provided with all the deadline and technical details provided, as well as a site detailing the particular countries' laws and procurement preferences. Japan, Canada, and the U.S. have provided free-access sites for the posting of contracts; the EU, however, still imposes a membership fee.²²

There are two other weaknesses that have a significant impact on the efficacy of the GPA. These are reciprocity and the scope of its membership, which includes few developing economies.

The preamble to the Agreement mentions "mutual reciprocity". It states:

.. "...to broaden and improve the Agreement on the basis of mutual reciprocity ..".²³

This objective may be a cause of concern. If the definition associated with "mutual reciprocity" is the "new reciprocity" defined by William Cline as reciprocity on a bilateral basis over a certain range of goods or services, the prospects for encouraging accession to the Agreement as well as broadening the scope of government procurement rules will be diminished.²⁴ If larger countries believe that it is politically necessary to obtain a balance in the value of government procurement opportunities with their trading partners, there is probably limited scope for further liberalization within the GPA.²⁵

Indeed, the current scope of the GPA in many respects reflects and highlights a reciprocal negotiation between the US and the EU. Such was the exclusiveness of this reciprocity element that Hong Kong initially refused to sign the agreement. Strictly negotiated reciprocity limits the scope of liberalization. Reciprocity may become a thinly disguised protectionist policy, by refusing to open one's own market because the size of the trading partner's market is smaller (see Annex 5).²⁶

threshold for purchasing entities at the sub-central level.

22 The U.S. only charges for the service of specifically informing those firms that request notice of postings. However, the time of postings are the same. This is significant however, as it provides the U.S. with a detailed list of small and medium sized firms who are interested in fulfilling government procurement contracts. This allows the U.S. procuring entity to enforce the legislative Small Business Act (1933), whereby if the procurer is aware of two small or medium sized firms that would place a bid, it is allowed to retain the posting and only inform those two enterprises.

23 World Trade Organization. Agreement on Government Procurement. (Marrakesh; WTO, 1994), 17.

24 William R. Cline, Reciprocity: A New Approach to World Trade Policy7 (Washington: Institute for International Economics, 1992).

25 The colds definition of reciprocity defined it as reciprocal changes in protection in trade negotiations, meaning the swapping of concessions in different sectors. This understanding of reciprocity would allow more progress toward procurement liberalization. It allows more flexibility in the package of concessions and focuses on the barriers to the market rather than the absolute market size.

26 Economists have found that reciprocity has no economic rationale. Since trade liberalization ought to be carried out even on a unilateral basis." The irony is that many countries are implementing and retaining protectionist policies to try to retain jobs, although in actuality these policies are, in the long term, detrimental to increased efficiency, technological progress, and

The nature of reciprocity in future GPA negotiations will also be important to Canada. Many countries have stressed the need for Canada to open procurement to sub-central entities. This will require a federal-provincial approach (for both technical strategy and institutional reasons) as the federal government is legally unable to unilaterally commit and enforce sub-central entities to the GPA. This has resulted in other countries, namely the US, the EU and Norway, indicating that this federal-provincial constraint has influenced their own interest in opening government procurement markets to Canada.²⁷ Canada has responded to this criticism by outlining the remaining exclusions and limitations that other countries maintain.²⁸

With respect to strictly reciprocal or sectoral type of government procurement liberalizing negotiation, Canada does not have a great deal of leverage, particularly as the federal government cannot make commitments for sub-central entities. By implication, federal-provincial co-operation with respect to government procurement, and trade-offs with other negotiating interests, will be a significant factor in the next GPA negotiations or in broader multilateral or regional trade negotiations. This is particularly important with respect to the US.

In the US, remaining barriers to government procurement liberalization include the Small-Business Act, its "Buy American" policies, the inclusion of only 37 states in the sub-central commitment of the GPA, and exclusion of sectors of key interest to Canada.²⁹ These exclusions are an example of protectionist trend that can be used for negotiating leverage on a bilateral basis.

The objective of broadening membership to developing countries has not been possible as a result of the trade wars resulting from the "mutual reciprocity" aspect, and for other reasons. One of these reasons is that the WTO agreement, while encouraging assistance in relation to access to developed country markets in Article V, has not provided countries with assistance in establishing an administrative structure conducive to accession. Such assistance could include the design of a legal and administrative blueprint for the integration of procurement entities throughout the public sector into a functional framework consistent with international obligations. Training would also be necessary for procurement officials to ensure that any international obligations that their countries ultimately undertake, are upheld.

The greatest obstacles for countries to taking on the GPA rights and obligations is

jobs. Thus, not only is reciprocity an obstacle to the potential of the new GPA, but also it is a self imposed obstacle by countries, to the benefits of liberalized procurement.

Arie Reich. The New GATT Agreement on Government Procurement; The Pitfalls of Plurilateralism and Strict Reciprocity *Journal of World Trade*. 31, no. 2; (1997).

27 Article XXIV-Final Provisions (5-a,b) of the agreement ensures that the laws, administrative regulations, and procedures of the country-specific entities listed in each country's Annex 1 conforms to the WTO agreement. Canada, although it agreed to commit its sub-central entities, has been unable to, and thus it could not conform its legislative laws and informed the WTO of the fact that it did not receive the provinces' agreement.

28 The coverage of federal Canadian departments and agencies is virtually complete in the GPA, less specifically identified exceptions. The remaining non-covered government procurement in Canada rests with a few federal Crown corporations, as well as provincial departments, agencies, and Crown corporations along with municipal departments, agencies, and corporations.

29 These sectors include construction-grade steel used in transportation projects and highway projects.

domestic opposition to open procurement. The government procurement market of developing countries can probably benefit the most from accession. For example liberalization would contribute to; increased efficiency, the promotion of innovation, and reducing corruption. With respect to all countries, anti corruption measures for government procurement policies need to be established.³⁰

To advance Canadian objectives without provincial entities, we have to look at either revising the NAFTA regional agreements' or at new regional agreements such as the FTAA (Free Trade Area of the Americas) which offers some scope not only for government procurement with the US, but also for bringing a number of developing countries into a formal government procurement agreement.

Canada must also consider government procurement negotiations in a broader context, and in respect to trade-offs in other negotiating issues of interest to Canada. Canada should thus pursue further negotiations within the context of government procurement on a non-reciprocal basis.³²

Summary

In sum, the GPA and its Tokyo Round predecessor are indeed accomplishments as they were developed amid great political and social sensitivities, as well as protectionist interests in many, if not all countries. It is a model in progress, however, and improvements of the aforementioned technical and other policy weaknesses would make it significantly more effective in attaining its objectives of increasing competition and efficiency and ensuring that our open, rules-based trade system covers more and more of our common economic interests.

Annex 1-Tendering Procedures

30 <http://www.oecd.org/puma/sigmaweb/pubs/ENGPDF/PBN03.HTM> *Sigma Policy Brief no 3: Public Procurement*.

31 For more information on the NAFTA government procurement, please see <http://www.infoexport.gc.ca/nafta/menu-e.asp>

32 However, from a negotiator's leverage standpoint, unilateral liberalization, the giving of concessions without receiving "concessions" of a similar value, is not a politically viable option .

Article VII of the GPA states that:" Each party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in articles VII through XVI."³³

Guidelines for the permission to use the three following tendering procedures are given in the text of the agreement, the corresponding article is identified with each definition.

Open Tendering: {Article VI1(3a), Article XI(2a)} All interested suppliers may submit a bid for a contract within a response time of 10-40 days.

Selective Tendering:(Article VII, Article X) The composition of a list of potential suppliers (must follow the non-discriminatory guidelines for the composition of this list, or is applicable in the case of exceptions i.e. US small business exception)

Limited Tendering: (Sole Sourcing) [Article VI1(3c), Article XV] Can only be applied under highly specific circumstances, for instance, when the learning curve is too steep for another firm to make a bid or when the contract is an extension of a previous one.

A procuring entity may award a contract without initiating public tendering process in the following circumstances (Article XV);

- when a proper tendering procedure has produced no usable tenders
- when exclusive intellectual property rights make it necessary to deal with a particular supplier
- in cases of extreme urgency
- for additional deliveries by an original supplier when no alternative could provide interchangeable equipment
- when prototypes or products are developed at the specific request of the procuring entity.

Other articles that address tendering are Articles VIII - Article XVII.

33 World Trade Organization. Agreement on Government Procurement. (Marrakesh; WTO, 1994), 23.

Annex 2 -Working Group on Transparency in Government Procurement³⁴

The objective of the Working Group on transparency is "to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement."³⁵

Members discussed the definition of the concept of transparency in government procurement in the study phase of the Working Group's mandate; and the aspects of transparency that the Working Group should cover in its study. As of November, 1997, members were still making suggestions and remarks on how the working group could proceed in the study phase of its mandate. They requested that the Secretariat prepare a paper presenting factual information on the provisions related to transparency in international instruments on government procurement procedures. The Secretariat has so far provided studies on the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Procurement of Goods, Construction, and Services and the World Bank Procurement Guidelines.

Delegations have identified a number of aspects of transparency that they believed the working group should cover in its study. These included access to procurement laws, regulations and procedures, public notices of procurement opportunities, information on qualification of suppliers, adequate time-limits for submission of bids, entities and threshold values to be subjected to the requirements of transparency, mechanisms for domestic review and procedures for the settlement of disputes between governments. Other issues were identified including the way in which national policy objectives were taken into account in exceptions to the principle of national treatment for developing countries, and the technical assistance they need.

Members asked the Group to recognize that transparency is essential in terms of market access even when national preferences are applied. Access to information on preferences or other conditions favoring national suppliers enables potential bidders to assess the conditions under which they are entering a bid and what their chances appear to be.

34 <http://www.wto.org/wto/govt/working.htm> WT/WGTGP/1 November 1997, Working Group on Transparency in Government Procurement Report (1997) to the General Council.

<http://www.wto.org> WT/WGTGP/W/6 October 1997, Synthesis of information Available on Transparency -Related Provisions in Existing International Instruments on Government Procurement Procedures and on National Practices.

<http://www.wto.org> WT/WGTGP/M/2 August 1997, Report on the Meeting of 21 July 1997.

35 <http://www.wto.org/wto/govt/working.htm> WT/WGTGP/1 November 1997, Working Group on Transparency in Government Procurement Report t1997J to the General Council.

Annex 3 -NAFTA

NAFTA's government procurement objective is clearly linked to the WTO's GPA. Its aim is: "to achieve liberalization of their measures regarding government procurement so as to provide a balanced, non-discriminatory, predictable, and transparent government procurement opportunity for the suppliers of each party."³⁶

It is clearly defined that in the case of an inconsistency between the two government procurement agreements that NAFTA should prevail.³⁷ As there is in the WTO agreement, there is a bid-protest mechanism, but NAFTA does not require a judicial review of procurement disputes.

One significant difference between the NAFTA and the GPA is the scope of coverage of the agreements. Only federal entities are covered in NAFTA. All three countries exempt from coverage transportation public utilities, telecommunication services, contracts for federally funded research and development centres, and government sponsored research. However, an important recent development is the inclusion of the Mexican utility companies PEMEX (Mexican gas) and CFE (Mexican utilities) which are expected to open up to bidding US \$3 billion annually over the next decade.³⁸

36 Chapter 10 of the NAFTA on Government Procurement Article 1001 :Objectives. Available at <http://www.infoexport.gc.ca/nafta/menu-e.asp>

37 Chapter 10 of the NAFTA on Government Procurement Article 1002: Scope and Coverage. Available at <http://www.infoexport.gc.ca/nafta/menu-e.asp>

38 <http://commerce.ca.goc/international/nafta/Govtproc.html> *Government Procurement* .

Annex 4-Asia Pacific Economic Cooperation and Government Procurement³⁹

In the 1994 Bogor Declaration, APEC leaders agreed to achieve free trade and investment in the Asia-Pacific Region by 2010 in developed countries, and by 2020 in developing countries. In 1995, in the Osaka Action Agenda, governments committed themselves to liberalizing government procurement and the Government Procurement Experts Group (GPEG) was established to manage the APEC economies' commitments to two broad procurement objectives. These are to;

- develop a common understanding on government procurement policies and systems.
- achieve liberalization of government procurement markets throughout the Asia Pacific region in accordance with the principles and objectives of the 1994 Bogor Declaration

To date the GREG has a number of achievements, these include:

- approved an action plan that includes objectives and specific actions
- maintained a list of contact points to facilitate information exchange among members
- completed surveys on government procurement systems in member countries (conducted to improve member's understanding of each others systems and to enhance public transparency)
- established a government procurement homepage on the APEC secretariat website at <http://www.apecsec.org.sg/govtproc/gphome.html>
- launched an education program to develop a common understanding about government procurement

The GPEG's 1997 work included contributing to the WTO's study on transparency in government procurement by providing information on the APEC members' regimes, their IAP (Individual Action Plan commitments in the area of government procurement) and APEC views on the elements of the principle of transparency. The APEC members plan to develop by the year 2000 a set of nonbinding principles for government procurement. These principles would be based on the free-trade principles already embraced by APEC.

³⁹ <http://www.apecsec.org.sg/govtproc/gphome.html>

APEC Update of Activities Within APEC. APEC, 1997.

APEC Summary Report: Ninth APEC Ministerial Meeting. APEC, 1997.

Annex 5-Reciprocity⁴⁰

The WTO's Government Procurement Agreement is subject to the WTO's MEN (Most Favored Nation) rules against discrimination between products and suppliers from any signatories to the agreement. However, due to the inclusion of reciprocity in the objectives of the agreement, the non-discriminatory aspect has been seriously undermined. Its inclusion reverses many of the positive aspects of trade liberalization, and may cause counterretaliatory trade wars.

The reciprocity aspect stipulates that for signatories' suppliers to have access to a market, they must give comparable access to their own markets (which causes confusion regarding access to a foreign market for suppliers). There is also a strict reciprocity in effect where certain sectors and entities are only accessible to suppliers of a certain country if that country has given explicit access in those same sectors or entities as the country of the potential supplier.

As a result of the reciprocity aspect, the WTO's Government Procurement Agreement has been detrimental to the liberalization of markets. For instance, before the GPA, the United States imposed a 6-12% price differential on **all foreign contracts**. Since implementation of the GPA there is no longer a price differential, however, only those signatories whose market access is comparable under their specific annex regulations are allowed to bid for a contract.

The result of reciprocity is the use of trade barriers against countries whose trade practices are considered nonreciprocal which may result in counterretaliatory action. Even if such a trade war does not ensue, there is no benefit to the country who initially engaged in retaliation; as engaging in such protectionist action results in higher prices for consumers, loss of efficiency, loss of competitive stimulus to technological change and economic costs of inflation.

39 For further analysis of the effects of reciprocity, please see:
(Cline 1992)
(Reich 1997)

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